IN THE SUPREME COURT OF MISSOURI
EN BANC

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON,	)	
Plaintiff/Respondent,	)	
vs.	)	**No. SC85399**
QUIKTRIP CORP.,	)	
Defendant/Appellant.	)	

Appeal from the Circuit Court of
Jefferson County

The Honorable Timothy J. Patterson
Circuit Judge

BRIEF OF RESPONDENT STATE OF MISSOURI

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Statement of Facts

Respondent submits its own Statement of Facts because relevant facts were omitted from the Statement of Facts in Appellant's Brief. Rule 84.04(f). This Court's review of the circuit court's order is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W. 2d 371, 376 (Mo. banc 1993). Accordingly, Respondent provides the following facts presented to the Court below and contained with the Legal File in this appeal.

Appellant, QuikTrip, is a retail seller of motor fuel now contesting the interpretation and constitutionality of Missouri's Motor Fuel Marketing Act as it has been applied to its store located in Herculaneum, Missouri, just off Interstate 55 south of St. Louis.

A. The Motor Fuel Marketing Act ("MFMA")

In 1993 the Missouri General Assembly enacted the MFMA, in which it proscribed

certain retail sales of motor fuel below the costs incurred by the retailer. § 416.600 *et seq.*, RSMo 1994.[1] Specifically, § 416.615.1 provided:

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[1] **The parties agreed and the trial court found that the 1995 amendment to § 416.615 was null and void, having been declared invalid under Article III § 23 of the Missouri Constitution in a *Hammerschmidt* challenge by the Cole County Circuit Court in 1996 in *Missouri Petroleum Marketers Association v. State of Missouri,* No. CV 195-989 CC. A copy of the Circuit Court's decision is attached as Appendix "A" for the Court's reference. Because the 2000 edition of the Revised Statutes of the State of Missouri have continued to print the amended version of § 416.615, reference is made herein to the 1994 version of the statute.**

It is unlawful for any person engaged in the commerce within this state to sell or offer motor fuel below cost as defined in subdivision (2) of section 416.605, if:

(1) The intent or effect of the sale is to injure competition; or

(2) The intent or effect of the sale is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor.

The MFMA also provides a private cause of action for competitors to seek damages. § 416.635.

Section 416.605(2) defines what should be included in a motor fuel retailer's calculation of its "costs":

(2) "Cost", is the sum of:

(a) a. If the motor fuel is not purchased from an affiliate, the lowest invoice cost that the seller charged to the purchaser for motor fuel of like grade and quality within three days prior to the date of any alleged unlawful resale by the purchaser, less trade discounts, allowances or rebates which the purchaser receives on the particular invoice or transfer; or

b. If motor fuel is purchased or received from an affiliate, the lowest transfer price that the affiliate charged to the purchaser or receiver for motor fuel of like grade and quality within three days prior to the date of any alleged unlawful resale by the

purchaser or receiver, less trade discounts, allowances, or rebates which the purchaser receives on the particular invoice or transfer; plus

(b) The cost of doing business; plus

(c) Freight charges and all applicable federal, state and local taxes not already included in the invoice cost or transfer price;

(3) "Cost of doing business", all costs incurred in the operation of the business for fair market rental value, licenses, taxes, utilities, insurance and nonmanagerial labor.

§ 416.605(2).[2] Under the MFMA's definition of costs, a retailer's "cost" represents the lowest "cost" incurred on any of the three days preceding the particular date in question.

B. Commencement of the Underlying Litigation Against QuikTrip

QuikTrip Corporation is an Oklahoma corporation headquartered in Tulsa, Oklahoma. L.F. 11 ¶ 2.[3] QuikTrip is engaged in the retail sale of gasoline and diesel

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[2] **QuikTrip contended that the statutory calculation of costs was to include the costs for the date in question. L.F. 339 ¶ 3. Although this question remained unanswered, due to QuikTrip's admissions to certain below-cost sales, whether the required calculation must be based on costs over the three days exclusive of the date in question, or inclusive of such date was not material to the case.**

[3] **References to the Legal File will use the abbreviation L.F. followed by a**

fuel in locations in Missouri. This action focused on QuikTrip Store No. 611, located near Interstate 55 south of St. Louis in Herculaneum, Missouri. L.F. 74 ¶ 3; L.F. 330-331.

The Attorney General brought an enforcement action against QuikTrip on January 21, 1999, alleging that QuikTrip had violated the MFMA when it sold motor fuel below cost where the effect of that sale was to unfairly divert trade from a competitor or otherwise to injure a competitor. L.F. 11-14 In this action the Attorney General sought injunctive relief and the imposition of a civil penalty. The Attorney General did not seek damages.

Following discovery, the parties pursued summary judgment motions relying on affidavits and additional stipulated facts, resulting in the entry of a partial summary judgment in favor of the State on August 27, 2002. L.F. 409-425. The trial court entered summary judgment on May 20, 2003, and the Attorney General voluntarily dismissed the remaining allegations of violations. L.F. 432-448, 449-450.

C. The Sales of Below-Cost Motor Fuel by Quik Trip's Store No. 611

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page number; if a numbered paragraph contains the referenced material, an additional ¶ designation will be provided.

QuikTrip typically sold between 800,000 and 1.1 million gallons of diesel fuel each month from Store No. 611; its total diesel sales during this 27-month time period were more than 25 million gallons. L.F. 325-328. "QuikTrip's business philosophy is to compete aggressively on price, on the theory that high volumes generate substantial profits even if the margin is low." App. Br. 23.[4] Accordingly, QuikTrip tracks prices each day at its Store No. 611. L.F. 267. QuikTrip has policies regarding monitoring its costs and setting prices above those costs:

> **As a corporate policy, QuikTrip maintains an automatic triggering mechanism which is activated when QuikTrip's posted gas prices come within a specified amount in excess of its cost of doing business. This triggering mechanism is specifically designed to insure that QuikTrip does not unintentionally violate the Act. ... The Area Supervisor, however, may not drop QuikTrip's prices below the automatic triggering amount without permission from the Division Manager. When the retail prices of QuikTrip and its competitors reach this automatic triggering amount, the Area Supervisor consults with the Division Manager who may consult with the Senior Vice President of**

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[4] **References to Appellant's Brief are referred to as "App. Br." with a page number designation.**

Operations. At this point, the exact cost of doing business is examined (without regard to [sic] artificial automatic triggering amount) and it is determined whether QuikTrip can meet the price without dropping below its cost of business. QuikTrip very rarely and with great reluctance will drop its retail prices below its cost of business and, in compliance with the Act, the only circumstances in which QuikTrip adjusts prices below its cost of business is to meet the price of a competitor."

L.F. 268

The State alleged 76 dates on which QuikTrip sold below cost with the proscribed effects, in response to which QuikTrip claimed it was matching the lower price of a competitor (the "meeting competition" defense)[5] to more than half and asserted, based on later calculations, that three other dates had not actually been below-cost. L.F. 337-338; L.F. 343-347. QuikTrip admitted that on 23 days it sold motor fuel both below its costs and below the prices of its competitors. Tr. 48-49.[6] The 23 dates were:

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[5] **The "meeting competition" defense refers to reliance on § 416.620.3, whereby a retailer may sell below its own cost if it is making a good-faith effort to meet the equally low cost of a competitor. The State did not contest QuikTrip's raising of this defense with regard to some of the alleged sales below cost.**

[6] **The Transcript filed in this appeal contains the hearings on the Motions for**

March 16, 1997	**April 25, 1997**	**September 30, 1997**
August 20, 1998	**August 21, 1998**	**August 22, 1998**
August 23, 1998	**August 24, 1998**	**August 25, 1998**
August 26, 1998	**August 27, 1998**	**August 28, 1998**
August 29, 1998	**August 30, 1998**	**August 31, 1998**
September 1, 1998	**December 27, 1998**	**December 28, 1998**
January 4, 1999	**January 5, 1999**	**January 6, 1999**
June 13, 1999	**July 19, 1999**	

LF. 23-26, 279-285 ¶¶ 18, 20, 23, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 67, 68, 69, 70, 71, 75, and 82. QuikTrip also admitted to selling gasoline below cost while not trying to meet a lower price of a competitor on June 14, 1999. L.F. 26, 285 ¶ 86.

Summary Judgment and Defendant's Motion for Rehearing. References to the Transcript are referred to as "Tr." with a page number designation.

QuikTrip produced to the State *extensive* cost records demonstrating the above-referenced below-cost sales and pricing which were filed by the State in support of its Motion for Summary Judgment. The evidence presented below largely consisted of spreadsheets prepared by QuikTrip. QuikTrip produced a summary of this data (pump price, average cost of fuel purchases on the date in question, lowest average cost of fuel purchases within the three days preceding the date in question, the allocable cost of doing business, and the margin or difference between the lowest statutory cost and the pump price). L.F. 30-70. QuikTrip produced additional spreadsheets showing all of its fuel purchases in 1997, 1998 and 1999 and including the itemization of all applied taxes and freight charges for each purchase, and including any reductions achieved in making "exchanges" in its gasoline inventory[7] (L.F. 85-235), data prepared by QuikTrip showing its annual calculations of its cost of doing business as defined by the MFMA (L.F. 77-78), and a report showing the

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[7] **QuikTrip has "exchange agreements" with certain vendors that allow QuikTrip to buy gas at bulk rates that are generally lower than rack rates. L.F. 267 These "exchanges" among QuikTrip and its vendors caused reductions in the cost of gasoline that are reflected as adjustments in this exhibit. This practice does not apply to diesel fuel, and QuikTrip's records indicated no "exchange" adjustments were made in diesel fuel costs. QuikTrip mentions its practice of "exchanging" inventory in its 4th Point Relied On.**

prices QuikTrip posted and charged at its pumps on each day (L.F. 236-266), all of which were submitted into evidence by the State. A subsequently prepared "Motor Fuel Margin Report" that re-calculated fuel costs under QuikTrip's competing interpretation of how fuel costs were to be calculated[8] was submitted by QuikTrip. L.F. 249-377.

To illustrate the detailed evidence on costs and pricing presented to the trial court, the State offers the following description of QuikTrip's pricing in late Summer 1998, during which time QuikTrip sold diesel fuel below its statutory cost, and for which QuikTrip does not raise any defense of meeting competition. From August 20, 1998, through September 1, 1998, QuikTrip priced its diesel fuel below cost -- a 13-day run. The evidence showed that on August 20 QuikTrip lowered its pump price for diesel from $0.83900/gallon to $0.82900/gallon. L.F. 253. This resulted in the margin between its costs (total fuel costs plus overhead) and its pump price dropping below zero. L.F. 42. The costs of buying more diesel fuel fluctuated

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[8] **See Footnote 2 above. The State did not pursue its summary judgment as to the dates that QuikTrip contended its "recalculation" showed the price to not be below cost.**

but tended to increase during this 13-day period so that by September 1 QuikTrip was selling diesel almost 2 cents below its costs. L.F. 42-44; 143-145.

On August 20, 1998, Quik Trip's average fuel cost, based on its purchase that day of 51,171 gallons, was $0.82836/gallon (including freight and taxes). L.F. 42, 143. For purposes of the statutory calculation of costs, QuikTrip relied on its average fuel costs the day before, which were the lowest fuel costs during the preceding three days.[9] During this time period QuikTrip's cost of doing business (as defined by § 416.605) was $0.0086937/gallon of diesel. L.F. 78. The combination of QuikTrip's lowest fuel cost plus its cost of doing business resulted in costs of $0.83732/gallon, which exceeded QuikTrip's set pump price of $0.8290/gallon. Beginning on August 20 and for the next 12 days, QuikTrip lost money on every gallon of diesel it sold. L.F. 42.

On August 27 QuikTrip's average fuel cost based on its purchase that day of 52,423 gallons of diesel fuel increased to $0.83461/gallon (including freight and taxes). L.F. 42, 144. For purposes of its statutory calculation of cost, QuikTrip

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[9] **Under the MFMA's definition of costs, QuikTrip's "cost" represents the lowest "cost" it had incurred on any of the three days preceding the particular date in question. § 416.605(2). Accordingly, to determine "cost" for the purpose of § 416.605(2), QuikTrip could adopt a fuel cost based on fuel purchases it made one, two, or three days before the actual sale date, plus its calculated overhead.**

relied on its fuel cost on the day before. This resulted in costs of $0.83633/gallon, exceeding a pump price of $0.8290/gallon. L.F. 42.

On August 28 QuikTrip purchased 37,154 gallons of diesel fuel paying an average fuel cost of $0.83508/gallon (including freight and taxes). L.F. 43, 144. For purposes of its statutory calculation of cost, QuikTrip relied on the cost of fuel on August 26. On August 28 QuikTrip's pump price continued to be $0.8290/gallon while its costs were $0.83633/gallon. L.F. 42-43.

On August 29, with the purchase of 37,431 gallons of diesel fuel, QuikTrip's fuel cost increased to $0.83996/gallon (including freight and taxes). L.F. 43, 144. For purposes of its statutory calculation of cost, QuikTrip again used its fuel cost from August 26, resulting in the same loss as experienced on August 28. L.F. 42-43.

On August 30 QuikTrip purchased 29,728 gallons of diesel fuel, and its fuel cost increased to $0.84343/gallon (including freight and taxes). L.F. 43, 144. For purposes of the statutory calculation, QuikTrip used its fuel cost from August 27, resulting in a cost of $0.84330/gallon compared to a continued pump price of $0.8290/gallon. L.F. 42-43.

On August 31, when QuikTrip purchased 44,522 more gallons of diesel fuel, its fuel cost increased to $0.84356/gallon (including freight and taxes). L.F. 43, 144. Using its fuel cost from August 28, QuikTrip had costs of $0.84377/gallon on fuel being sold for $0.8290. L.F. 43.

Finally, on September 1, with the purchase of 44,567 gallons, QuikTrip's fuel cost slightly decreased to $0.84064/gallon (including freight and taxes). L.F. 44,

145. QuikTrip's statutory costs on September 1 were $0.84865/gallon while its pump price remained at $0.8290/gallon. On September 1 QuikTrip was selling gas at almost 2 cents below its cost. L.F. 44.

On September 2 QuikTrip raised its pump price by nearly 7 cents and began generating 4 cent/gallon on diesel sales. L.F. 44, 254. During the course of that day, when QuikTrip purchased 51,439 gallons, its average fuel cost had risen to $0.85661/gallon. L.F. 145. But its newly raised pump price now exceeded costs.

D. The Effects of Store No. 611's Below-Cost Sale in the Herculaneum Market

QuikTrip's Store No. 611 in Herculaneum checks the prices of its competitors daily and maintains a log of its own daily prices and any reason for a change it might make. L.F. 267. QuikTrip's St. Louis Division Manager testified that Store No. 611 faces intense competition in the sale of gasoline where it competed against some 11 retailers in about a three-mile radius. L.F. 330 ¶ 2.

The St. Louis Division Manager testified that the diesel market was substantially larger, exceeding 100 miles in radius, because over-the-road truckers would buy hundreds of gallons of diesel fuel at a time. Consequently, he stated they "have every incentive to seek the lowest price. Over-the-road truckers communicate among themselves on a daily basis concerning the lowest cost sources of fuel." L.F. 331 ¶ 3. QuikTrip's counsel elaborated by saying that "diesel truckers know exactly where the low cost is. They have to. They're buying in huge lots, 200, 250 gallons a pop. A penny or two on a purchase of that size makes an enormous difference to these

folks, and they are on the internet morning, noon, and night, 24 hours a day. They know exactly where the low price is." Tr. 39.

QuikTrip's manager testified regarding diesel fuel that "[i]f vendors in other states underprice Store No. 611, they will take business away from it." L.F. 331 ¶ 3. Thus, Store No. 611 "faces intense competition in the sale of diesel fuel." L.F. 331 ¶ 3. QuikTrip acknowledged that when a retailer lowered its price to meet the lower price of another competitor, that retailer lost money and any profit made in the long run "would have been higher absent the necessity to match the lower price." L.F. 399; L.F. 406 ¶ 199. Because of the intense competition, the retail sale of motor fuel in the Herculaneum area is a "low margin business." L.F. 294 ¶ 146.

This view that competition on price was intense was echoed by the other area retailers of motor fuel. The owners of competing retailers testified that during the 1997-1999 time frame, QuikTrip led the market price down and almost never had prices higher than those of its competitors. L.F. 71 ¶ 7; L.F. 74 ¶ 4; L.F. 397 ¶ 4; L.F. 403 ¶ 4. They each testified that whenever QuikTrip lowered its prices, they were forced to lower their own prices, or they would lose customers to QuikTrip. L.F. 75 ¶ 6; L.F. 397 ¶ 5; L.F. 403 ¶ 5. Donald McNutt, the president of Midwest Petroleum, testified that on several occasions in 1997 his company's station located in Imperial matched QuikTrip's prices, with the result being it sold fuel at a loss. L.F. 74-75 ¶¶ 4-6. He testified that customers are "'very price sensitive' in making gasoline purchasing decisions. There is a direct negative effect on our sales volume when our prices to the public are higher than those of our competitors." L.F. 75 ¶ 6.

Donald McNutt testified that QuikTrip was the pricing leader in the Herculaneum area market and priced fuel "most aggressively" of all of the competitors there. L.F. 75 ¶ 6.

David Mangelsdorf, the president of Home Oil Service Company, which operated the I55 Motor Stop ("McStop") at the Pevely exit along Interstate 55, testified that "[i]n the years 1997, 1998 and 1999, QuikTrip usually lead the market downward in the Herculaneum/Pevely area. QuikTrip seldom had prices that were higher than its competitors in the area." L.F. 397 ¶ 4. Mangelsdorf provided an illustration of the intense price competition in the area based on its own pricing records:

> **On January 26, 1998 at 7:30 a.m., the QuikTrip station in Herculaneum, Missouri and I55 Motor Stop in Pevely were charging $.839 per gallon for regular unleaded gasoline. At approximately 9:30 a.m. the QuikTrip station in Herculaneum lowered their price to $.829 per gallon for regular unleaded gasoline. At approximately 10:30 a.m., I55 Motor Stop lowered its price to $.829 to match the QuikTrip in Herculaneum. On January 27, 1998 at 7:30 a.m. the QuikTrip in Herculaneum and I55 Motor Stop were both charging $.829 per gallon for regular unleaded gasoline."**

L.F. 397-398 ¶ 6. That price drop observed by I55 Motor Stop is reflected in QuikTrip's own records. L.F. 59. Interestingly, the gasoline sales QuikTrip made on January 27, 1998 were among those QuikTrip admitted to being below cost in

this lawsuit, but QuikTrip claimed to be "meeting competition" because QuikTrip set those prices for the purpose of matching the price charged by I55 Motor Stop (McStop). L.F. 338, 298 ¶ 184. The next day QuikTrip raised its price for unleaded gasoline by 15 cents/gallon. L.F. 59, 338.

Kevin Manning, an officer and director of Arogas, Inc., which does business as Mr. Fuel, located off Interstate 55 in Pevely, competed closely with QuikTrip on price: He testified that whenever QuikTrip lowered its price, Mr. Fuel had to lower its price or his store would lose customers to QuikTrip. L.F. 403, ¶ 5. He testified to matching QuikTrip's prices on numerous occasions, L.F. 72 ¶ 7. QuikTrip claimed a number of its below-cost sales that were included in the State's lawsuit (but were not included in the summary judgment) were the result of its matching Mr. Fuel's lower prices. L.F. 337-338.

Kevin Manning testified that QuikTrip did not allow other stations to match its price, especially in diesel fuel:

> **This was especially true of the Phillips 66 branded station which is located close to the QuikTrip location. If a 'branded' competitor like Phillips matched QuikTrip's price for regular unleaded gasoline or for diesel fuel, within a matter of hours, QuikTrip would usually drop its price so that it stayed under the price charged at the other station.**

L.F. 71 ¶ 6.

Manning testified that QuikTrip was "typically the first to lower prices, that is, QuikTrip initiated lower prices, rather than simply responding to its

competitors' pricing." L.F. 71 ¶ 7. He stated that if the Mr. Fuel station priced its fuel higher than QuikTrip, Mr. Fuel would lose customer business. L.F. 72 ¶ 9. "Whenever QuikTrip in Herculaneum lowered prices, Mr. Fuel was forced to either lower its price to keep its customers or lose customers to QuikTrip." L.F. 403 ¶ 5. He testified that when Mr. Fuel tried to match QuikTrip's prices in August 1998 (when QuikTrip has admitted it was selling below costs), it did so at a loss of 2 cents per gallon; Mr. Fuel stopped trying to match that price because it could not continue to operate at a deficit: "If Arogas matched QuikTrip's pricing, it would suffer financial losses on fuel sales." L.F. 72 ¶ 9.

QuikTrip did not refute these characterizations. It admitted, "Whenever QuikTrip in Herculaneum lowered its price, Home Service Oil Company's Pevely location was forced to either lower its price to keep its customers or lose customers to QuikTrip. L.F. 388, 406 ¶ 196. QuikTrip admitted, "Whenever QuikTrip in Herculaneum lowered its price, Arogas, Inc./Mr. Fuel was forced to either lower its price to keep its customers or lose customers to QuikTrip." L.F. 388-389, 406 ¶ 198. QuikTrip admitted, "Midwest Petroleum would lose money when it priced to meet a low-price competitor and even though a profit may show for a year, it would have been higher absent the necessity to match the lower price." L.F. 389, 406 ¶ 199. QuikTrip admitted, "QuikTrip is the pricing leader in the Herculaneum market, leading prices in that market up and down, others follow QuikTrip." L.F. 389, 406 ¶ 201. QuikTrip's own Division Manager testified, "As a general rule, QuikTrip does not allow its competitors to underprice QuikTrip." L.F. 334 ¶ 9.

QuikTrip did not offer any justification for setting its prices for motor fuel below cost outside of the instances when it was matching a lower price of a competitor. Additionally, QuikTrip did not offer any evidence of any common or accepted practice in the retail motor fuel industry that involved below-cost pricing. Accordingly, the trial court found:

> **The parties stipulated on the record that there are no material facts in dispute regarding QuikTrip's liability for the Twenty-three dates that are the subject of the state's motion considering that the statute is constitutional without a predation requirement.**
>
> **On every day where QuikTrip priced below cost without a valid statutory defense, there is no dispute that such pricing caused injury to competitors. QuikTrip's competitors have sworn affidavits stating that they are forced either to lose business or lower prices and thereby suffer economic injury. QuikTrip's own affiant, Chuck O'Dell, likewise admits that when vendors price below QuikTrip they will take business away.**

L.F. 447 (Judgment p. 16)[citations omitted.].

E. QuikTrip's Constitutional Challenge

QuikTrip raised multiple arguments before the trial court against the constitutionality of the MFMA, but the only points raised on appeal relate to substantive due process: first, QuikTrip claims that the Act denies substantive due

process because it does not serve a legitimate public purpose, and, second, that the Act violates due process because it is "impossible" to comply with.[10]

Regarding the first of these contentions, the State described to the trial court the public purpose of the Act as being to preserve and protect competition *and* to protect motor fuel retailers. Tr. 12. The State argued that the "purpose is not to protect inefficient competitors, it's to protect competitors from retailers who are willing to set their price not based on efficiency but on willingness to lose money." Tr. 14. QuikTrip agreed that protecting competition and protecting competitors from being forced out of business were both valid public policies. Tr. 37-38.

QuikTrip argued that the MFMA as it was being applied in this case, however, served only the purpose of forcing QuikTrip to raise its prices so its competitors could earn more profit. L.F. 427. It argued, "Our competitors in this market are not being hurt at all as a result of our below-cost sales except that their profits just aren't quite as astronomical as they otherwise would be." Tr. 35. QuikTrip presented evidence that two of the testifying competitors appeared to still be financially solvent. L.F. 290 ¶¶ 123-124; L.F. 292 ¶ 137. No competitors left the market during the three years in issue. L.F. 288 ¶ 107. QuikTrip's own average profit margin for gasoline during the months in which the violations occurred was 5.52 cents per gallon, and its average profit margin for diesel fuel was 4.34 cents per gallon (March 1997 through July 1999). L.F. 288 ¶¶ 101, 103.

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[10]QuikTrip's 3rd and 4th Points Relied On.

As to the second issue, QuikTrip's St. Louis Division Manager testified that because of intense competition on price in the motor fuel business, it is "inherently a low margin business." L.F. 294 ¶ 146. However, he sometimes set prices for the Herculaneum store based on his own estimates of QuikTrip's costs that erred by as much as 10 cents per gallon. L.F. 294 ¶ 146; L.F. 333 ¶ 6. QuikTrip never identified any dates on which these errors occurred.

QuikTrip claimed three deficiencies in the way it handled its business that deprived its manager of complete information. First, sometimes QuikTrip's stores would "exchange" their previously purchased fuel with others. This could result in an adjustment to cost that would not be reflected until they replaced that traded-away fuel. Second, QuikTrip tanker truck drivers were given discretion as to where and at what price they actually bought new fuel. Because QuikTrip's retail stations did not obtain pricing information at the time they received delivery of the fuel, QuikTrip would wait until the vendor of the fuel invoiced the sale through QuikTrip's corporate office in Oklahoma. Additionally, because selection of fuel was up to the tanker drivers, actual freight costs were not recorded until the driver sent an invoice in. These delays in fuel invoices and freight invoices could exceed a week, even a month. The result was that when the St. Louis Division Manager set prices for QuikTrip's Herculaneum store, he did so without precise cost information. L.F. 293-94 ¶¶ 142-145.

QuikTrip did not show how *any* of these deficiencies caused it to estimate a cost that was lower than its actual cost should have been. Thus, QuikTrip did not

identify any prices that were set too "low" by its Division Manager due to his not having complete cost information. No price that was the subject of this case was "linked" to an error in assessing QuikTrip's costs. Additionally, there was no evidence that QuikTrip was incapable, as a large national and sophisticated company, of correcting or improving its own record-keeping so that it would have more complete cost information.

Meanwhile, the competitors of QuikTrip testified that at the time they set their own pump price they *knew* their costs, including their invoice costs, federal and state taxes, freight charges and their allocable overhead. L.F. 398 ¶¶ 7- 8; L.F. 403 ¶¶ 6-7.

In response to the State's motion for partial summary judgment, QuikTrip argued that the MFMA implied a "predation" requirement so that in order to violate the Act a retailer must either intend to injure competition or threaten the existence of a particular competitor. Tr. 32. The trial court ruled that the Act did not require predation. L.F. 411-12; App. Br. 9. The parties agreed that the issues being presented to the trial court dealt with the interpretation of the MFMA and its constitutionality as applied to QuikTrip. Tr. 49.

The trial court ruled that the MFMA satisfied substantive due process, that the State had made its *prima facie* showing that QuikTrip had made below-cost sales with the effect of either injuring a competitor or of unfairly diverting trade from a competitor, and granted partial summary judgment in favor of the State. Following QuikTrip's motion for rehearing, and the State's dismissal of its other allegations

based on other dates of selling below cost, the trial court entered summary judgment in favor of the State finding 23 violations of the MFMA and assessing civil penalties against QuikTrip. QuikTrip appealed.

Argument

I. The Trial Court Correctly Interpreted The MFMA As Requiring Proof Of A Sale Below Cost And Either The Effect Of Unfair Diversion Of Trade Or Of Other Harm To A Competitor.

A. The Missouri Motor Fuel Marketing Act ("MFMA")

In 1993 the Missouri legislature passed the Missouri MFMA addressing competition among the sellers of motor fuel (gasoline and diesel fuel) to consumers.

The State's cause of action for a violation of the MFMA arises from § 416.615 of the MFMA, which provides in salient part:

> **1. It is unlawful for any person engaged in the commerce within this state to sell or offer motor fuel below cost as defined in subdivision (2) of section 416.605, if:**
>
> > **(1) The intent or effect of the sale is to injure competition; or**
> >
> > **(2) The intent or effect of the sale is to induce the purchase of other merchandise, to unfairly divert trade from a competitor, or otherwise to injure a competitor.**

Another relevant portion of the MFMA is § 416.620, which excepts certain types of transactions from being found to violate § 416.615. The type of transaction pertinent here is described in subsection 3, which excepts those sales below cost

when the seller is making a "good faith effort to meet an equally low price of a competitor." This provision is often referred to as the "meeting competition" defense, and QuikTrip asserted this defense in response to approximately half of the sales it agreed were below cost. L.F. 295-298 ¶¶ 147-186. Also relevant is § 416.605(2), which defines the term "costs" based on the individual motor fuel retailer's actual costs of acquisition of fuel and the actual cost of doing business.

Sections 416.625 and 416.630 set forth the authority of the Attorney General to pursue an action for civil penalties and injunctive relief, while § 416.635 provides a cause of action for damages for private parties, i.e., competitors, who have been injured in their business in the geographical market by reason of unlawful below-cost selling. Finally, § 416.640 shifts the evidentiary burden to the defendant when the State or the private plaintiff first makes a *prima facie* showing of a violation under § 416.615, saying, "Unless justification is shown, the court shall award judgment for the plaintiff."

B. <u>Statutory Construction</u>

The State initiated its lawsuit pursuant to § 416.615 against QuikTrip based on QuikTrip's pricing practices at its store along Interstate 55 in Herculaneum, Missouri. Because construction of the MFMA is essential to this Court's consideration of this case, we focus our attention on the words used by the legislature in promulgating the law, neither adding nor ignoring any. It is "from the plain and ordinary meaning of the terms in the statute" that the court determines

legislative intent and, thus, the meaning of the law in question. *In re Beyersdorfer*, 59 S.W.3d 523, 525 (Mo. banc 2001).

When a term is not expressly defined within a statute, Missouri courts will use the common meaning found in the dictionary. *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002). The court will not look at words used in isolation but rather in the context of the statute. *J.B. Vending Co, Inc. v. Director of Revenue*, 54 S.W.3d 183, 187 (Mo. banc 2001). If, after this, there remains a question as to intent, the court may consult other legislative or judicial meanings ascribed to the words in question. *Boone County v. County Employee's Retirement Fund*, 26 S.W.3d 257, 261 (Mo. App. W.D. 2000). Among those meanings are those found in prior laws and court decisions. The legislature is presumed to know its prior laws, as well as any judicial decisions or interpretations of the terms it used in those laws. *Citizens Electric Corp. v. Director of Revenue*, 766 S.W.2d 450, 452 (Mo. banc 1989); *County of Jefferson v. QuikTrip Corp.*, 912 S.W.2d 487, 490 (Mo. banc 1995).

The parties agree that the MFMA does not prohibit *all* below-cost sales of

motor fuel. App. Br. 14.[11] The offer or sale of motor fuel below cost satisfies only the first element of a violation. The words and grammar of the statute make clear that a violation requires both a below-cost sale and the satisfaction of one or more of the proscribed intents or effects set forth in subsections (1) and (2) of § 416.615.1. Subsection (1) makes actionable a below-cost sale when "the intent or effect of the sale is to injure competition." Subsection (2) sets out six *other* ways in which a below-cost sale may violate the statute:

1. **If the intent of the sale is to induce the purchase of other merchandise,**
2. **If the effect of the sale is to induce the purchase of other merchandise,**
3. **If the intent of the sale is to unfairly divert trade from a competitor,**
4. **If the effect of the sale is to unfairly divert trade from a competitor,**
5. **If the intent of the sale is to otherwise injure a competitor, or**
6. **If the effect of the sale is to otherwise injure a competitor.**

***See* § 416.615.1(2). Only those sales that meet the criteria of either subsections (1) or (2) of § 416.615.1 and that do not fall within the exceptions offered by § 416.620, are illegal.**

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[11] **Throughout this litigation, QuikTrip has erroneously asserted that the State contended that *any* sale below cost violates the MFMA. *See, e.g.*, App. Br. 15, 17, 19, 20. This is not what the State contended, nor is it what the circuit court found. L.F. 447 (Judgment p. 16) .**

The State alleged violations of subsection (2), and it is over the meaning of this subsection that the parties disagree. QuikTrip repeatedly tries to superimpose the term "unfairly" into the last term proscribing below-cost sales, i.e., when the "effect" is "to otherwise injure a competitor." *See, e.g.*, App. Br. 15, 24. But courts cannot add words to a statute under the auspice of statutory construction. *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002). The word "unfairly" applies only to "divert trade from a competitor." The effect of "otherwise to injure a competitor" stands as a separate unlawful effect.

The State's Petition alleged that QuikTrip's sales were below cost and had both the effects of unfairly diverting trade from a competitor and of otherwise injuring a competitor. L.F. 13 (Petition ¶ 14). The trial court found that the State proved both proscribed effects. The issue for statutory interpretation on this point is what the legislature intended these two alternative "effects" to mean. To better evaluate the legislature's intent in proscribing both of these effects, one should understand what led up to the passage of the MFMA and what remedies motor fuel retailers had in the marketplace prior to its enactment.

C. <u>Historical Context</u>

When the legislature was considering the MFMA, motor fuel retailers had available traditional federal and state antitrust causes of action. Under existing law, a retailer who was losing revenues because another retailer was pricing below cost could pursue an action for attempted monopolization under the Section 2 of the Sherman Act, 15 U.S.C. § 2 (or its Missouri counterpart at § 416.031(2)). An

attempted monopolization action based on "predatory pricing" requires proof that the predator is selling not just at "cost," but below any reasonable level of return. And it requires proof that the predator is selling for the purpose of, and has a "dangerous probability" of succeeding in, either "killing" or sufficiently "disciplining" the victim competitor so as to ensure the predator will maintain monopoly power sufficiently long enough to recoup all of its lost profits and gain enough extra profits so as to make its deliberately incurred losses "rational." ***Matsushita Electric Industrial Co. v. Zenith Radio Corporation*****, 475 U.S. 574, 589, 106 S.Ct. 1348, 1357, 89 L.Ed.2d 538 (1986);** ***see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*****, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993). Like any other monopolization action, a claim based on predatory pricing requires proof of specific intent.** ***E.g., Metts v. Clark Oil & Refinery Corp.*****, 618 S.W.2d 698, 703 (Mo. Ct. App. E.D. 1981) (gasoline retailers allegations of monopolization by an oil company failed to meet antitrust burden of proof). As the Supreme Court has observed, "predatory pricing schemes are rarely tried, and even more rarely successful."** ***Matsushita*****, 475 U.S. at 589, 106 S.Ct. at 1357.**

A motor fuel retailer attempting to use the existing remedies faced another challenge. Antitrust law generally focuses on the state of overall competition, not the state of individual competitors. To prove an action under the Sherman Act, one must show that competition in the market has been reduced by the practice being attacked. The fact that one, or two or a few individual competitors have suffered losses may not alone ensure that diminution of competition. Other strong

competitors may still survive and other new competitors may enter. *Brooke Group Ltd.*, 509 U.S. at 224, 113 S.Ct. at 2588. ("That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'")

This existing federal law, and Missouri's similar state antitrust law, was the backdrop in 1959 when, in legislation that later served as one model for the MFMA, the Missouri legislature adopted pricing restrictions affecting Missouri's dairy industry. The Unfair Milk Advertising Act ("Milk Act") restricts pricing and advertising practices among producers, processors, and retailers of milk products. § 416.410, *et seq.*, RSMo 2000. While there are significant differences between the Milk Act and the MFMA -- some of which are material to QuikTrip's other contentions -- recognition of both the similarities and the differences is helpful in construing the legislature's intent in enacting the MFMA. As few commodities are so necessary and so frequently purchased by consumers as milk and gas, it is no surprise these industries have been specifically addressed by the legislature.

The Milk Act was passed to ensure evenhanded competition among the processors and distributors of milk by, among other things, prohibiting certain below-cost sales. Section 416.415 of the Milk Act states:

> **No processor or distributor shall, with the intent or effect of unfairly diverting trade from a competitor, or otherwise injuring a competitor, or of destroying competition, or of creating a monopoly, advertise,**

offer to sell or sell within the state of Missouri, at wholesale or retail, any milk product for less than cost to the processor or distributor."

Thus, like the MFMA, the Milk Act proscribed below-cost sales when the effect was "unfairly diverting trade from a competitor." Like the MFMA, § 416.425 of the Milk Act provided a plaintiff with the ability to make a *prima facie* showing of a violation. The MFMA also adopted several exemptions that had been available under the Milk Act. One such exemption is the "meeting competition" defense to a below-cost sale, available when a retailer was matching a competitor's lower price. § 416.445.

However, the legislature didn't completely duplicate the Milk Act when it enacted the MFMA. As the trial court noted, the MFMA added a proscribed effect of below-cost sales that was not listed in the Milk Act: Under the MFMA, a below-cost sale is unlawful if it has the intent or effect of inducing the purchase of other merchandise (the practice of using motor fuel as "loss leader" to sell other merchandise). L.F. 436-437 (Judgment pp. 5-6). The addition of this proscription, while not the basis for the State's allegation of violations in this case, substantially undercuts QuikTrip's arguments as to what "to unfairly divert trade from a competitor" means, for it distinguishes cases applying the Milk Act cited by QuikTrip.

D. "<u>To Unfairly Divert Trade From A Competitor</u>"

QuikTrip's argument is focused almost exclusively on the proscribed effect of below-cost sales "to unfairly divert trade from a competitor." It points out that

"unfairly" diverting trade from a competitor cannot be the same as simply diverting trade. The State agrees. According to Webster's New Collegiate Dictionary, the term "unfairly" means "in an unfair manner" and the term "unfair" is defined as "1. Marked by injustice, partiality, or deception: UNJUST. 2. Not equitable in business dealings." (1980).

This Court stated the term "unfairly diverted trade" is "subject to reasonable interpretation" in *Borden Company v. Thomason* where it examined the Unfair Milk Advertising Act's specific proscription against below-cost sales which had the "effect of unfairly diverting trade from a competitor." *Borden Company v. Thomason*, 353 S.W.2d 735, 754 (Mo. banc 1962) (citations omitted). In *Borden* this Court rejected a constitutional challenge to the meaning of the tem, stating that whether a below-cost sale of milk "has unfairly diverted trade is a matter of proof in each instance and must depend on the facts and circumstances shown." *Id.*

In seeking guidance on applying this phrase, this Court looked at another phrase, "unfair method of competition," which had been construed by the United States Supreme Court in 1920 when it entered its decision in *Federal Trade Commission v. Gratz*, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920). *Gratz* involved allegations brought under the Federal Trade Commission Act, 15 U.S.C.A. § 45, that a St. Louis sales firm and its agents and distributors were "tying" their sale of steel ties used in packing cotton bales with a required purchase of jute bagging material to cover the bales. According to the opinion, absolutely *no* evidence of the impact of

this "tying" practice on the sales or general diminution of trade of competing sellers of steel ties was produced in the case. The Court concluded, therefore, that the unilateral "tying" arrangement was not an "unfair method of competition." In so doing, it espoused its view on what could *not* be considered an "unfair method of competition":

> **The words "unfair method of competition" are not defined by the statute and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.**

***Borden,* 353 S.W.2d at 754, quoting *Gratz*, 253 U.S. at 427; 40 S.Ct. at 575.**

The Supreme Court later opined that the term "unfair method of competition" "belongs to that class of phrases which does not admit of precise definition, but the meaning and application of which must be arrived at by what this court elsewhere has called the 'gradual process of judicial inclusion and exclusion.'" *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643, 648, 51 S.Ct. 587, 75 L.Ed.1324 (1931). In *Raladam,* another early Federal Trade Commission (FTC) action taken against the seller of a weight-loss product, the Court construed "unfair methods of competition" as meaning those "unfair methods" that "must be such as injuriously

affect or tend thus to affect the business of these [present or potential] competitors -- that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or likely to be, lessened or otherwise injured." 283 U.S. at 649; 51 S.Ct. at 590. The Court concluded that "[u]nfair trade methods are not *per se* unfair methods of competition." *Id*.

As in *Gratz*, the FTC had presented *no* evidence of the "effect" the contested advertising would likely have on the business of any competitors and had limited its case to the misleading nature of the advertisements themselves *vis a vis* consumers. Because it was "impossible to say whether, as a result of respondent's advertisements, any business was diverted, or likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured" the court found the FTC failed to prove an "unfair method of competition." *Raladam*, 283 U.S. at 652-653; 51 S.Ct. at 592.

This Court continued to rely on the *Gratz* view of an "unfair method of competition" in two later cases in which it applied Missouri's Unfair Milk Advertising Act. In both cases the milk retailer had made below-cost sales *only* for a few days in order to introduce a new product or open a new store. *State ex rel. Davis v. Thrifty Foodliner, Inc.*, 432 S.W.2d 287 (Mo. 1968) (four-day "grand opening" sale), *State ex rel. Thomason v. Adams Dairy*, 379 S.W.2d 553 (Mo. 1964) (three-day promotion to introduce new brand of milk). In both cases the trial court found that

the retailer's short-term, below-cost price to attract patronage to the store and sell other products was a common practice in the grocery store industry. In *Thrifty Foodliner*, this Court observed that "the evidence discloses, rather convincingly, that the use of 'leaders' and 'loss leaders' by retail grocers, both generally in Missouri and in the Springfield area, is a recognized, frequently used and ordinary practice to attract customers in to their stores." 432 S.W.2d at 290. Likewise, *Adams Dairy* involved a short promotion of a new product in a supermarket. 379 S.W.2d at 554. Accordingly, this Court concluded that short-term promotional uses of milk as a "loss leader" was "a recognized, frequently used and ordinary practice" and never before considered to be against public policy.

In both *Thrifty Foodliner* and *Adams Dairy*, the State had presented the *prima facie* evidence of a below-cost sale (under § 416.425.2), but when the company offered justification for the practice on the basis that the diversion was not "unfair" because it was a temporary "loss leader," the State apparently made *no further proof* and, effectively, failed in meeting its burden of proof.

This Court had been guided by the construction of "unfair method of competition" under *Gratz*. But the limitations suggested by *Gratz* (and *Raladam*) on what could be construed as an "unfair method" was criticized in later federal cases, and, in 1972, the United States Supreme Court adopted an expanded view of the types of conduct that the FTC could find to be "unfair." *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972). In *Sperry*

& *Hutchinson*, the Supreme Court criticized its earlier statement in *Raladam* that "[u]nfair trade methods are not per se unfair methods of competition," and recanted its perspective in *Gratz* as being "too confined." 405 U.S. at 241-242, 92 S.Ct. at 904. The Court went on to hold that "unfair competitive practices were not limited to those likely to have anticompetitive consequences after the manner of the antitrust laws" and that "unfair practices" were not "confined to purely competitive behavior." 405 U.S. at 244, 92 S.Ct. at 905. Both *Thrifty Foodliner* and *Adams Dairy* were rendered before the United States Supreme Court decided *Sperry & Hutchinson.*[12] The broader federal view of what may be found "unfair" would call into question the "test" relied upon by QuikTrip for finding any practice to be "unfair." App. Br. 16.

Additionally, distinguishing this Court's prior decisions applying the Unfair Milk Advertising Practices Act is the fact that when the legislature enacted the MFMA it chose to expressly prohibit the practice of selling motor fuel below cost

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[12] **The Supreme Court acknowledged the FTC was authorized by Congress to determine what practices were "unfair" and, in so doing, to consider public values beyond those encompassed by the spirit of the antitrust laws. In particular, it noted the FTC's own policy statement of factors it considered in making that determination. Those factors exceeded the *Gratz* considerations. *Sperry and Hutchinson*, 405 U.S. at 244, 92 S.Ct. at 905.**

when doing so as a "loss leader." This is important because such promotional "loss leader" selling was the very practice that had been viewed as "a recognized, frequently used and ordinary practice" in the grocery business. The MFMA expressly prohibits sales below cost that have the effect of inducing the purchase of other merchandise. § 416.615.1(2).

QuikTrip's apparent reliance on this Court's Milk Act decisions involving temporary promotional sales is thus completely unfounded. Indeed, this Court cautioned against such reliance when it reiterated that its determination was "necessarily limited to the facts and circumstances of record." ***Thrifty Foodliner*****, 432 S.W.2d at 291. Beyond its reliance on short-term "loss leader" sales of milk, QuikTrip offered no other circumstances suggesting its below-cost sales were a common and accepted practice in the retail motor fuel industry so as to justify those sales.**

Thus, as discussed further below, the State presented uncontraverted evidence that, in the Herculaneum area where QuikTrip's Store No. 611 competes, there is such intense price competition in both gasoline and diesel fuel that when competitors failed to match QuikTrip's prices, their customers went to QuikTrip. ***E.g.*****, L.F. 331 ¶ 3. The diversion was so significant that competitors would often lower their own prices to try to match QuikTrip's price.** ***E.g.*****, L.F. 74-75 ¶¶ 4-6. When QuikTrip caused that diversion by selling below cost, it unfairly diverted trade from a competitor.**

E. <u>"Otherwise To Injure A Competitor"</u>

The MFMA proscribes several unlawful "effects" of below-cost sales. One of the other "effects" prohibited is the "effect" of injuring a competitor with below-cost sales. The State alleged that QuikTrip's sales also had this an unlawful effect. L.F. 13 (Petition ¶ 14). QuikTrip raises no question as to the trial court's interpretation of this "effect" other than to try to insert the word "unfairly" as an additional modifier, which has already been discussed. *E.g.*, App. Br. 15. The trial court found QuikTrip's below-cost sales were also unlawful because they had the effect of injuring competitors. L.F. 471 (Judgment p. 17).

The phrase "injure a competitor" is not defined by the statute, but "injury" is commonly equated with damage or loss. Webster's New Collegiate Dictionary defines injury to mean: "1 (a): an act that damages or hurts: wrong. (b): violation of another's rights for which the law allows an action to recover damages. 2: hurt, damage, or loss sustained." (1980).

Equating injury with "damages" or "loss" in interpreting "injury to a competitor" was the approach taken by the Wisconsin Court of Appeals in a private action brought by a motor fuel retailer in that state. *Gross v. Woodman's Food Market, Inc.*, 655 N.W.2d 718 (Wis. Ct. App. 2002). There, the defendant primarily sold fuel to its own fleet of trucks, selling relatively little fuel to the public at large, and it did not advertise its prices -- they were not even visible from the road but only posted on the pumps. Accordingly, the trial court found, and the appellate court agreed, that the defendant competitor's diesel fuel prices did *not* divert diesel customers from the plaintiff. But because the competitor's prices were below cost

and, the plaintiff contended, those lower prices "forced" him to lower his own price to avoid losing customers, the plaintiff suffered injury by losing profits. The appellate court affirmed the grant of summary judgment for the plaintiff.

The trial court has properly interpreted the MFMA in this case. As discussed in greater detail below, the State proved that QuikTrip's below-cost sales had the effect of unfairly diverting trade from a competitor and the State proved QuikTrip's below-cost sales had the effect of injuring a competitor. This Court should affirm the summary judgment entered below.

II. The State Proved Violations Of The MFMA By Showing QuikTrip's Below-Cost Sales Unfairly Diverted Trade From Competitors And Otherwise Injured Competitors.

In its Second Point Relied On, QuikTrip complains that the State failed to prove that QuikTrip's below-cost sales unfairly diverted trade from a competitor and otherwise injured a competitor. As this Court observed in *Borden Company v. Thomason,* whether a below-cost sale "has unfairly diverted trade is a matter of proof in each instance and must depend on the facts and circumstances shown. " 353 S.W.2d at 754. The proof here showed that QuikTrip's below-cost sales "unfairly diverted trade" and "otherwise injured" a competitor as those elements are properly defined. See I., *supra*.

Under § 416.640, the State was required to make a *prima facie* showing of a violation. If it did so, the evidentiary burden shifted to QuikTrip to demonstrate "justification" for its below-cost sales. Without repeating all of evidence described in the Statement of Facts, the following key facts support the State's *prima facie* showing that QuikTrip made below-cost sales and that those sales had the proscribed effects of "unfairly diverting trade from a compeititor" and of "injuring a competitor," thus satisfying the State's burden of proof for entry of a summary judgment:

QuikTrip sold motor fuel below cost and, as a result, competing sellers of motor fuel lost trade or they were injured by reason of having to lower their own prices to meet those of QuikTrip, or both. The evidence centered on the Herculaneum area -- a stretch of Interstate 55 south of St. Louis -- where competition based on price was intense in both gasoline and diesel fuel. L.F. 330 ¶ 2; L.F. 331 ¶ 3. It was so intense that when a competitor failed to match the lowest price they lost business to the lower-priced competitor. L.F. 331 ¶ 3; L.F. 75 ¶ 6; L.F. 397 ¶ 5; L.F. 403 ¶ 5. They tried to match prices so as to not lose customers. L.F. 75 ¶ 6. In so doing, they lost profit they otherwise anticipated earning when they set their initial price. L.F. 72 ¶ 9; L.F. 74-75 ¶¶ 4-6. Quik Trip justified some of its other below-cost sales by its own matching of competitors' lower prices. *E.g.*, L.F. 298 ¶ 184; L.F. 337-338. Competitors closely monitored each other's prices -- more than once a day. *E.g.*, L.F. 397-398 ¶ 6. Because of intense competition, the retail sale of motor fuel in the Herculaneum area is a "low margin business." L.F. 294 ¶ 146. QuikTrip's competitors only priced below cost when they were meeting the lower price of a competitor. L.F. 398 ¶ 7-8; L.F. 403 ¶¶ 6-7. The State proved -- and QuikTrip agreed -- that competitors in the Herculaneum area lowered their own prices in an effort to avoid losing those customers who would buy fuel elsewhere if the price were lower.

Here the diversion of trade was the *known and expected* result of QuikTrip's lower price, and the impact of that lost trade was *significant enough* to cause

QuikTrip's competitors, on multiple occasions, to reduce their own prices -- even to the point of actually selling at a loss -- in order to try to keep their customer share.

That evidence was more than sufficient to make the *prima facie* case required by § 416.640. Under § 416.640, QuikTrip was then obligated to "justify" its making of below-cost sales once the State made *prima facie* showing of a violation. But in the face of the uncontroverted evidence, QuikTrip offered nothing. Despite its reliance on the *Adams Dairy* and *Thrifty Foodliner* cases, it made no showing that its below-cost sales were a common and accepted practice in the motor fuel industry so as to be "justified." QuikTrip completely failed to justify its sales in the face of the State's evidence of violations.

QuikTrip admitted that when a competitor lowered its price to meet another competitor's lower price, that competitor lost money -- any profit made in the long run "would have been higher absent the necessity to match the lower price." L.F. 399; L.F. 406 ¶ 199. When a competitor loses profits in matching the lower price of another competitor who has chosen to sell below its own cost, it suffers the type of injury that the MFMA is intended to prevent. While lowering its price may have mitigated the diversion of customers on that occasion, the competitor has still lost the revenue it should have earned if it were matching a *properly* set price of its competitor. The resulting loss in profit to the competitor was found to be "injury" in the case of *Gross v. Woodman's Food Market, Inc.* discussed above. *Woodman's*

***Food Market*, 655 N.W.2d at 738. It was adequate evidence of injury in the case below as well.**

The evidence justified the trial court's finding that diversion did occur among the Herculaneum-area competitors when QuikTrip lowered its prices below its costs. The evidence also justified the court's finding that QuikTrip's selling below cost had the effect of causing injury to its competitors when they adjusted their own prices downward to meet its. On both theories of liability, the State made its *prima facie* case, and QuikTrip failed to offer any justification for its practices.

III. The MFMA Serves A Legitimate Governmental Purpose And Therefore Does Not Violate Due Process.

In its last two points QuikTrip mounts a constitutional challenge to the MFMA on substantive due process grounds, apparently claiming that the MFMA violates its "liberty to contract." App. Br. 26. Statutes, of course, are presumed by the Court to be constitutional. *Smith v. Coffey,* 37 S.W.3d 797, 800 (Mo. banc 2001). The burden of showing unconstitutionality rests on QuikTrip, as this Court will not invalidate a statute "unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution." *Id.*, quoting *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000); *Borden,* 353 S.W.2d at 744. QuikTrip fails to meet that burden.

In considering a constitutional challenge alleging a violation of substantive due process, the court must determine whether the statute has a "rational relationship" to a "legitimate state interest." This determination is based upon two inquiries: whether the objective or purpose of the statute is a legitimate state interest, and whether the means selected by the legislature to accomplish that purpose are rationally related to the end sought. *Blue Cross Hospital Service, Inc. v. Frappier*, 681 S.W.2d 925 (Mo banc 1984), *vacated on other grounds*, 472 U.S. 1014,

105 S.Ct. 3471 (1985)*; Missouri Dental Board v. Alexander*, 628 S.W.2d 646 (Mo. banc 1982).

A. <u>"As Applied" v. "Facial" Challenge</u>

Before reaching QuikTrip's two due process claims, however, we must turn to a preliminary issue it raises. In an apparent attempt to minimize its burden in making these challenges, QuikTrip distinguishes between a "facial" and an "as applied" due process challenge. QuikTrip asserts that it is "only" challenging the Act "as applied" and is *not* mounting a facial challenge. App. Br. 26, 30. QuikTrip represents it is only "challenging the public purpose prong of due process analysis, and not the rational relationship prong." App. Br. 31. QuikTrip asks this Court to consider *only* the facts of this case in identifying the legislature's purpose and reaching a conclusion as to whether it is "legitimate state interest."

The "purpose" of a statute cannot be construed in such a contrived setting -- rather it must be ascertained based on the words of the legislature. There is no authority for any court to try to identify and evaluate a statute's purpose as a legitimate state interest using what QuikTrip asserts to be an "as applied" basis. Instead, an "as applied" challenge attacking the constitutionality of a statute necessarily focuses on the nexus between the statute's identified intended purpose and how the statute actually applies to the individual contesting the law so as to reveal whether that application is "rationally related" to that legitimate state interest. *See e.g., Schnuck Markets v. City of Bridgeton*, 895 S.W.2d 163 (Mo. App.,

E.D. 1995) (grocer did not challenge constitutional validity of a zoning ordinance, but claimed its application to the grocer was unreasonable because of the high cost of compliance the negligible benefit to be received).

B. Identification Of The Legitimate State Interest

QuikTrip contends that the governmental purpose of the MFMA is to "inflate the already substantial profits of its competitors" and to provide "higher profits for healthy private business at the expense of the public." App. Br. 26, 31. But those are not the purposes of the Act. The trial court correctly found that the MFMA "protects both competition and competitors from injury due to below-cost sales." L.F. 435 (Judgment p. 4)(emphasis original). To find otherwise would render much of the second subsection of § 416.615.1 meaningless, and make it virtually mirror longstanding antitrust laws. *Id.* Protecting retailers of motor fuel from unfairly losing trade or suffering injury when others sell below cost promotes fair competition among all retailers. The trial court's finding that "protecting motor fuel retailers from injury and unfair diversion of their customers" when another competitor was selling below cost was a legitimate state interest should be upheld. L.F. 441 (Judgment p. 10).

The legislature was certainly authorized to enact laws restricting certain pricing practices of motor fuel retailers. Laws restricting competition, even to the point of setting prices and limiting possible profits, have been found to be within the legislature's proper authority – an authority which is plenary, subject only to

express restriction by the constitution. *Coldwell Banker Residential Real Estate Services v. Missouri Real Estate Commission*, 712 S.W.2d 666 (Mo. banc 1986). This Court has observed that "[t]here was a time when the Supreme Court of the United States struck down economic regulations with some regularity as violative of due process, but that day is past." *Coldwell Banker*, 712 S.W.2d at 668. As this Court has noted, freedom of competition is not a "constitutional imperative," and several highly restrictive price-related statutes have withstood due process attacks. *Id.* at 668 (noting due process challenges have failed against the Unfair Milk Advertising Act and the wholesale liquor price posting laws which restrict the ability of liquor wholesalers to change their posted prices).

The legislature is vested with considerable discretion to regulate economic conditions, even to the point of actually fixing prices, and this Court has repeatedly declined to interfere simply because other methods could have been adopted to reach the legislative goal. *E.g., Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991) (statute preventing causes of action against providers of architectural and engineering services following ten years after services rendered upheld against substantive due process and constitutional claims). That it is within the province of the legislature to regulate pricing in the retail sale of motor fuel cannot be reasonably questioned. Quoting from the United States Supreme Court's decision in

***Nebbia v. People of New York*, this Court has recognized that a state is authorized to restrict pricing practices:**

> **If the lawmaking body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumers' interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the Legislature to be fair to those engaged in the industry and to the consuming public.**

***Borden,* 353 S.W.2d at 745; *Nebbia* 291 U.S. 502, 516, 54 S.Ct. 505, 537, 78 L.Ed. 940 (1934).**

The Missouri legislature, like its New York counterpart, clearly has authority to enact statutes actually setting prices; the MFMA does not go nearly that far.

This Court has also appropriately recognized the important distinction between legislation that some might view as unwise from that which is actually constitutionally flawed. "The propriety, wisdom, and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the legislature." *Borden,* 353 S.W.2d at 742, quoting *Star Square Auto Supply Co. v. Gerk*, 30 S.W.2d 447, 462 (Mo. 1930). The court will *not* inquire into the "wisdom, social

desirability or economic policy underlying a statute" – that is the role of the legislature. *Miss Kitty's Saloon, Inc. v. Missouri Department of Revenue*, 41 S.W.3d 466, 467 (Mo. banc 2001). Thus, even if one believed that there are better or more effective ways to promote or protect competition in the sale of motor fuel than the proscriptions set forth in the MFMA, the Act falls squarely and exclusively within the province of the legislature.

Judicial invalidation of economic regulation is exceedingly rare, as suggested by the case relied upon by QuikTrip, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). As noted by the U.S. Court of Appeals for the Sixth Circuit in *Craigmiles*, such cases must offer nearly the pungence of "five-day old, unrefrigerated dead fish" to merit judicial intervention. *Id*. at 226. The Sixth Circuit denounced a statute as a "naked attempt to raise a fortress protecting monopoly rents that funeral directors extract from consumers" in the sale of caskets because there was no justification for restricting the sale of caskets to licensed funeral directors so as to prevent any other retailers from selling caskets. *Id*. at 229. The MFMA is patently distinguishable from the statute challenged in *Craigmiles*, most notably in the fact that its limitations do not prevent participation in or entry into any industry by anyone.

The trial court's finding is consistent with this Court's previous identification of the legitimate state interest underlying the Unfair Milk Advertising Act as well as the legitimate state interests found through judicial construction of

several other states' motor fuel pricing laws. This Court found the Milk Act to be a proper exercise of police power to remedy conditions in the milk producing, processing and retail industries, noting the impact of destructive price wars and the resulting squeeze placed on smaller distributors. *Borden,* 353 S.W.2d at 742. Quoting from a report from the legislative committee that had studied the milk industry prior to the enactment of that law, this Court stated:

> **A series of destructive price wars has frightened and demoralized those of our citizens who fully understand the implications of such activities as well as those who depend for their livelihood upon the milk industry. .... Of course, prices such as these are often greeted with enthusiasm by inflation-weary consumers, but the natural consequences thereof bode future difficulties for producers, distributors and consumers alike. Price wars exert tremendous pressure on smaller distributors who are without the resources to operate for extended periods of time with a loss is incurred on each sale. The price of much of the milk being purchased from producers in Missouri is established under a federal order. Thus the distributor finds himself trapped between the contracting pincers of the stable price of milk he buys and the ever lower price of milk he sells. Under such conditions small distributors disappear and large distributors expand until competition no longer controls prices and the buyer is left to the mercy of the seller.**

***Borden,* 353 S.W.2d at 742.**

These characteristics are not absent from the retail sale of motor fuel, where retailers buy and sell fuel on a very thin margin. In the intensely competitive Herculaneum-area fuel market, there already exists considerable vulnerability to a negative return if the retailer is not as efficient as his competitors.

The trial court's finding is also consistent with this Court's prior recognition that the focus of the MFMA is the protection of competition -- "ultimately to protect buyers/consumers who eventually could be harmed by monopolistic takeovers in the marketplace." *Ports Petroleum Co., Inc. v. Nixon*, 37 S.W.3d 237, 241 (Mo. banc 2001). The MFMA addresses competition in the motor fuel market in a more forward-looking manner than the immediate or day-to-day decision-making view of the consumers in that market. Like antitrust laws, the MFMA looks to the on-going health of competition and its preservation for the future benefit of consumers. But its protections go beyond the existing antitrust by protecting against injury when motor fuel retailers sell below their own costs to undercut the market's prices.

The trial court's finding is also consistent with the policies expressed by other states in their adoption of below-cost pricing restrictions on motor fuel retailers. For example, the Florida legislature, in adopting a motor fuel marketing act with many similarities to Missouri's MFMA, found that "fair and healthy competition in the marketing of motor fuel provides maximum benefits to consumers in this state, and that certain marketing practices which impair such

competition are contrary to the public interest. Predatory practices and, under certain conditions, discriminatory practices, are unfair trade practices and restraints which adversely affect motor fuel competition." Fla. Stat. § 526.302 (1991). The Florida Act prohibits all below-cost sales "where the effect is to injure competition," § 526.304(1)(b), and defines "competition" to mean "the vying for motor fuel sales between any two sellers in the same relevant geographic market." § 526.303 (2).[13] The Florida Court of Appeals upheld the constitutionality of the Act on substantive due process grounds in *Sixty Enterprises, Inc. v. Roman & Circo,* 601 So.2d 234 (Fla. App. 3rd Dist. 1992), finding that the law promoted "the legitimate interest in protecting healthy competition in the marketing of motor fuel, thus increasing economic benefit." 601 So.2d at 237.

In *Woodman's Food Mart,* discussed above, the competitor challenged the constitutionality of the Wisconsin law on substantive due process grounds complaining that it punished a retailer even if the retailer did not have any "intent" to violate the law. The Wisconsin court noted that the imposition of liability without fault -- even when a statute imposes punitive sanctions such as the fine

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[13]**Of note, the Florida statute did *not* require diversion to be "unfair," but did except out "isolated, inadvertent incidents" of below-cost selling. § 526.304(2)(a).**

imposed by the Wisconsin law -- does not itself violate due process. 655 N.W.2d at 741. The court rejected this claim with an observation relevant to the case here:

> **The prohibition of sales below statutory cost that have the effect of inducing the purchase of other merchandise, unfairly diverting trade from a competitor, or otherwise injuring a competitor has a real and substantial relationship to the purpose of the statute, which is to prevent the economic harms that result from such sales. ... Indeed, the prohibition of sales with the specified injurious effects arguably bears a closer relationship to achieving that purpose than the prohibition with injurious intent, since the former focuses on the very results of below-cost sales that the legislature sought to protect against.**

655 N.W.2d at 742. In this case, the effect of QuikTrip's below-cost sales on other competitors is the harm the MFMA is intended to prevent.

While the MFMA prevents competitors from certain effects of below-cost sales, it preserves competition based on efficiencies. When the MFMA applies, it limits a retailers' prices *only* by that retailer's own actual costs. § 416.605.2. Retailers' actual costs are constrained only by their ability to save money on their

acquisition of motor fuel and to conduct their operations with maximum efficiency. The more efficiently retailers operate and acquire fuel, the lower their costs will be. In an intensely price-competitive market like the one along Interstate 55 near Herculaneum, motor fuel retailers are surely motivated to save costs and reduce overhead. Legitimate state interests are *well* served when competitors compete on the basis of their own efficiencies rather than on their ability and their willingness to absorb negative margins or make up for those margins through other operations.

QuikTrip, of course, looked for authority contrary to the trial court's conclusion. It points to the decision of the Arkansas Supreme Court in interpreting a below-cost pricing statute in *Ports Petroleum Co., Inc. v. Tucker*, 916 S.W.2d 749 (Ark. 1996). But that decision actually affirms the legitimacy of the state interest served by the MFMA: Even in invalidating that state's below-cost statute, the Arkansas Supreme Court stated, "We have no hesitation in affirming the trial court on the point that the subject matter of Act 380 falls within the General Assembly's police powers to regulate an industry of general public interest." 916 S.W.2d at 753. That court, in a facial challenge to the Arkansas motor fuel marketing act, expressed concern that the law might ultimately punish "legitimate below-cost strategies," and concluded it went beyond the legitimate purpose of preserving competition. The decision offered no examples of what such "legitimate below-cost strategies" might be. Nor has QuikTrip in its "as applied" challenge in this case.

QuikTrip directs the Court's attention to the cases of *Twin City Candy & Tobacco Co. v. A. Weisman Co.*, 149 N.W.2d 698 (Minn. 1967) and *Commonwealth v. Zazloff*, 13 A.2d. 67 (Pa 1940). In *Twin City Candy*, the court ruled unconstitutional a statute banning, and criminally sanctioning, *all* sales of cigarettes below cost and not requiring *any* evidence of either a harmful effect or a predatory intent. Even there, the Minnesota court opined that statutes prohibiting below-cost sales but employing appropriate constitutional safeguards are *unquestionably* within the state's police power. *Twin City Candy*, 149 N.W.2d at 701. Likewise, in *Zazloff*, the Pennsylvania Supreme Court ruled that state's Fair Sales Act unconstitutional because it imposed criminal sanctions, subject to only a few exemptions, on *all* sales "of any merchandise at less than cost." *Zazloff*, 13 A.2d at 68.

In contrast, no one disputes that the MFMA is a *civil* statute rather than a *criminal* law, and it does *not* forbid all below-cost sales. Other Missouri statutes allow for the imposition of civil penalties based on "effect" without requiring proof of any "intent" on the part of the violator. For example, under Missouri's Merchandising Practices Act, unless a defendant affirmatively demonstrates its unlawful practices were the result of "*bona fide* error notwithstanding the maintenance of procedures reasonably adopted to avoid the error," a court may assess civil penalties based on each transaction involving an unlawful misrepresentation, deception or unfair practice. § 407.100.6. *See, e.g., State ex rel.*

***Nixon v. Consumer Automotive Resources, Inc.*, 882 S.W.2d 717 (Mo. Ct. App. E.D. 1994) (defendant failed to plead or prove statutory defense of bona fide error, therefore penalty assessed for amount roughly equivalent to amounts defendant unlawfully obtained from consumers upheld).**

Could the MFMA, as QuikTrip claims, serve to "increase the profits of otherwise healthy business?" Even if it might, QuikTrip's complaint that its competitors have maintained an overall positive balance sheet does not negate the fact that QuikTrip's below-cost pricing had detrimental effect on them. QuikTrip admitted as much. L.F. 399; L.F. 406 ¶ 199. The MFMA does not ensure any competitors' continued profitability. The very most that MFMA can do is temper their losses against less scrupulous competitors. When any competitor can lower fuel prices because of improved efficiency and cheaper supply costs, the other competitors are going to feel the pinch of *genuine* competition. They should. Those fundamental market dynamics are not impeded by this law -- competitors will *have* to match those savings or they will lose money in an intensely competitive market. Competition is enhanced when efficiency is rewarded with greater sales.

The application of the MFMA to QuikTrip in the case below does not serve to "increase" its competitors' profits. Competition based on real costs is not "gouging the public." Fair competition, based on *bona fide* prices, is what the MFMA promotes, and that is a legitimate state interest. QuikTrip has not been denied substantive due process. Accordingly, the Court should affirm the decision below.

IV. The MFMA Is Not "Impossible" To Comply With.

In its final point, QuikTrip complains that, due to its own peculiar methods of tracking costs in its procurement of motor fuel, it cannot ascertain before it sets its prices on motor fuel the exact costs it has incurred. And, it claims, its alleged difficulty renders the MFMA "impossible" to comply with and, therefore, unconstitutional in its application. Like any other constitutional challenge, QuikTrip bears the burden of proving "impossibility." *Suffian,* 19 S.W.3d at 134.

QuikTrip's evidence on this point came principally from its Division Manager who testified that he sometimes sets the fuel prices for Store No. 611 based on estimates which can vary by as much as 10 cents from its actual costs. L.F. 294 ¶ 146; L.F. 333 ¶ 6. But that does not prove "impossibility."

Section 416.605(2) defines the term "costs" and § 416.615 establishes those costs as the lower limit or "floor" for purposes of setting the retail price of motor fuel in the circumstances proscribed by the Act. QuikTrip does not contend that the statute's definition of "costs" in § 416.605(2) cannot be understood.[14] It simply

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[14] **As noted in the Statement of Facts, QuikTrip disagreed over whether the statute calls for consideration of the lowest cost on any of the three days preceding the date of the sale exclusive of that date, or also should include the fuel costs on the date of sale. To this the State's response is the statute defines costs based on the**

complains that the methodology it has adopted for collecting cost information does not facilitate its ready access to all available cost information at the time it sets its price. The MFMA does not direct *precisely how* a business must maintain its accounting records for assessing costs. But it does set a restriction on pricing based on costs, and this requires, indirectly, that companies conduct their business so as to make costs calculable.

The showing of "impossibility" for purposes of showing that a statute would violate due process as applied to a person is a very high burden to meet. One does not avoid compliance simply because they prefer other methods of record-keeping. But, more importantly, a party must show it is *really* impossible for them to comply even if they tried. In a recent case discussing such a contention, *United States v. M/G Transport Services, Inc*., 173 F.3d 584 (6th Cir. 1999), the owner of a barge charged with illegal dumping of waste oil complained it was "impossible" to obtain the dumping permits he would have needed to cover all the gallons of waste he dumped into the river. The Sixth Circuit Court of Appeals said that so long as permits were available for some discharge -- they existed for that purpose and *could* have been sought -- the barge owner's claim of "impossibility" failed. The Sixth Circuit easily distinguished that situation from its earlier decision in *United States v. Gambill*, 912

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retailer's costs before the date the price is set.

F.Supp. 287 (S.D. Ohio 1996), *aff'd*, 129 F.3d 1265 (6th Cir. 1997), relied upon by QuikTrip. In *Gambill*, the defendant was required by one law to register and pay taxes on machine guns, while another law forbade the government from registering such guns or accepting taxes on them. Where the government could not accept a registration it violated due process to prosecute an individual for failing to make that registration.

In this "impossibility" challenge, QuikTrip contends that it does not and cannot reasonably ascertain its exact costs on the day it sets its prices. App. Br. 34. For this contention it relies on the testimony of its St. Louis Area Manager who averred that *sometimes* QuikTrip acquired motor fuel by an "exchange" with "someone else" in the area where motor fuel "owned by QuikTrip in some other area" was traded with that "someone else." QuikTrip did not obtain cost information until it purchased new fuel to replace that which it had traded away. L.F. 332. As reflected in the extensive cost and detailed spreadsheets produced by QuikTrip, not a single "exchange" adjustment was made in diesel fuel costs; all purported "exchange margin" adjustments related only to gasoline (and appear only to have *reduced* those costs). L.F. 85-235. QuikTrip presented no evidence that it was "impossible" to modify its "exchange" practice. Additionally, QuikTrip made *no* attempt to demonstrate how any exchange adjustment ever caused it to estimate a cost below its correct statutory cost.

The same may be said for Mr. O'Dell's contention about QuikTrip's receipt of invoices from the vendors from whom it purchased fuel. QuikTrip offered *no* evidence that it was under any obligation to continue in this particular manner or that its practices could not be modified. Additionally, QuikTrip offered no evidence that this practice actually contributed to an errant assessment of cost in setting any of the prices that were below its correct statutory price.

Finally, QuikTrip's contention that freight costs were not known at the time it priced its fuel falls to the same infirmities. QuikTrip pointed to no law requiring freight charges be handled in this manner. It offered no evidence that its practices could not be modified. And it never demonstrated that these practices actually contributed to any errant assessment of cost in setting any of the prices in issue.

QuikTrip's reliance on the 1950 opinion of the Kansas Supreme Court in *Southwestern Bell Telephone Co. v. State Corporation Commission*, 219 P.2d 361 (Kan. 1950) is hardly precedent for finding the MFMA is "impossible" for QuikTrip to comply with. That case, brought before the development of computers and technology even approximating what is available and used by QuikTrip today, involved an order that Southwestern Bell and its affiliate provide a fully detailed accounting of segregated historical costs in a proceeding to establish telephone rates and justify their request for an increase. Most importantly, the detailed information sought in that case was *not* information that one would expect those businesses to have maintained in the ordinary course of business with the same

exacting precision. In stark contrast, what could be more important to QuikTrip than its own bottom line on costs?

QuikTrip's competitors stated that they *did* know their actual costs at the time they priced their motor fuel, specifically, that they could ascertain the cost of the fuel, the applicable state and federal taxes, the transportation or freight costs, as well as their allocable overhead. L.F. 398 ¶ 7-8; L.F. 403 ¶ 6-7.

QuikTrip points to no law or regulation requiring it to conduct its business in a manner that is incompatible with the MFMA. The only "impediment" it points to is its own business preference as to how it orders, procures, and pays for inventory. That a business has chosen a centralized accounting system, adopted certain paper-work handling practices, and delegated certain decision-making authority in such a way that information containing the desired level of precision is not immediately made available to the employee making motor fuel pricing decisions simply does *not* meet the standard for a due process challenge on a claim of "impossibility." One could wryly observe that QuikTrip, among the most prosperous of America's privately-held businesses[15] has only now, as a defendant in a state enforcement action initiated over five years after the statute went into effect, complained that MFMA is

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[15]**With over 405 convenience stores and a billion dollars in annual sales, QuikTrip was recently ranked 46th on the Forbes List of Privately Held Companies according to its company website. Http://www.quiktrip.com/aboutqt/aboutqt.asp.**

"impossible" to comply with. It is also curious that QuikTrip would *presumably* be able to satisfactorily price motor fuel in its home state of Oklahoma where that state's own version of a motor fuel pricing statute defines "costs" using the actual invoice cost of the fuel that QuikTrip complains is illusive at the time it sets prices in Missouri. Okla. St. Ann. Tit. 15 § 598.2. Regardless, such speculative and hypothetical evidence as that presented by QuikTrip in no way proved the MFMA presents "impossible" requirements so as to be unconstitutional as applied to QuikTrip. The judgment below should be affirmed.

Conclusion

For the reasons stated above, the Court should affirm the decision of the trial court.

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 14,988 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of WordPerfect Version 9. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Anne E. Schneider

Certificate of Service

The undersigned counsel certifies that one copy of this brief and one copy on floppy disk, as required by Missouri Supreme Court Rule 84.06(g), were served on each of the counsel identified below by hand-delivery or placement in the United States Mail, postage paid, on this 3rd day of December 2003:

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